IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 7, 2008

STATE OF TENNESSEE v. BENJAMIN S. HUFFMAN, JR.

Appeal from the Criminal Court for Sumner County
No. 205-2007 Dee David Gay, Judge

No. M2007-02103-CCA-R3-CD - Filed May 14, 2009

The defendant, Benjamin S. Huffman, Jr., entered nolo contendere pleas to two counts of vehicular homicide based upon driver intoxication, a Class B felony, and pled guilty to one count of reckless aggravated assault, a Class D felony, one count of reckless endangerment, a Class E felony, and one count of driving on a revoked license, first offense, a Class B misdemeanor. The parties agreed to an eight-year sentence on one of the vehicular homicide convictions but left the defendant's sentence on the other vehicular homicide count to the discretion of the trial court. Following a sentencing hearing, the trial court imposed the maximum sentence of twelve years as a Range I, standard offender for that offense. The trial court ordered this sentence to be served consecutively to his sentence on the other vehicular homicide count. The sentences on the other convictions were ordered to be served concurrently, resulting in an effective sentence of twenty years. On appeal, the defendant argues that the trial court (1) improperly applied the "victim vulnerability due to age or physical or mental disability" and "no hesitation to commit the offense when the risk to human life was high" enhancement factors to his sentence; (2) improperly imposed consecutive sentences; (3) erred in allowing "double hearsay" testimony to be admitted at the sentencing hearing; and (4) erred by taking judicial notice of an exhibit from one of the defendant's previous criminal cases. After reviewing the record, we conclude that the trial court erred by applying the "particular vulnerability" enhancement factor to the defendant's sentence. However, given that the two other enhancement factors were supported by the record, we conclude that the defendant's sentence on Count 2 of the indictment was still appropriate. We also discern no reversible error as to the defendant's other stated issues. Accordingly, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Paul J. Walwyn, Madison, Tennessee, for the appellant, Benjamin S. Huffman, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and William J. Lamberth, II, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the defendant's August 10, 2007 sentencing hearing, Tennessee Highway Patrol Trooper Allen Brenneis testified that he investigated the accident at issue in this case. Trooper Brenneis said that as part of the investigation, he "examined the scene of the crash and the vehicles involved in the crash," and he also "read the interviews of the witnesses, occupants, and first responders, as well as the toxicology reports from the Tennessee Bureau of Investigation's crime lab."[1] Trooper Brenneis said that as a result of his investigation, he determined that on May 16, 2006, the defendant was driving a 1995 Mazda MX-6 in which Christina Keaton, age 17, Shawn Pallottini, age 18, and Megan Bevington, whose age is not apparent from the record, were passengers. The defendant was traveling southbound on Cedar Point Road, which Trooper Brenneis described as a "two-lane, not-in-very-great-repair road;" at the same time, Rebecca Sanders was driving an empty school bus in the northbound lane. Trooper Brenneis described the subsequent events as follows:

> As [the defendant] comes around this curve . . . he's going too fast to maintain his lane and he crosses across the double yellow lines, and he . . . sees this bus coming down the road apparently, and he swerves back to his right.
>
> At the point where he swerves back to his right, he runs off the shoulder of the roadway into the tall grass. . . . He overcorrects, and when he pulls the vehicle back out onto the roadway, he goes into what we call a yaw, which is nothing more than a vehicle rotating around the center mass and spinning out. When this yaw occurs, the [defendant's] vehicle is traveling between 74 and 79 miles per hour.
>
> . . . .
>
> The vehicle crosses across the center line again coming back across. The bus driver sees the vehicle coming, veers to the right and attempts to brake. . . . [Sanders] gets the bus all the way over to the far edge as far as she could possibly go without running completely off the roadway and going into the ditch herself. She gets the bus at or near stopped at the point of impact, and then the car slides into her.

Trooper Brenneis said that the car's passenger side hit the front of the school bus, killing

[1]None of these documents referenced by the trooper appear in the record on appeal; the only documents regarding the accident which appear in the record are Trooper Brenneis' accident reconstruction report, consisting of a summary of the trooper's investigation and an "after crash situation map," and five photographs taken at the accident scene shortly after the crash.

Pallottini and Keaton and injuring the defendant and Bevington.[2] He added that nobody in the car wore a seat belt at the time of the crash, and that at the time of the accident, he obtained the defendant's state-issued identification card, which contained the notation, "DUI offender, not valid for the operation of any type of vehicle."

Trooper Brenneis testified, over the defendant's objection, that as part of his investigation he spoke with an emergency medical technician (EMT) who treated Bevington at the scene. According to the trooper, Bevington "stated [to the EMT that] when she had gotten in the vehicle, . . . everyone was drinking; [and] when she realized that [the defendant] was intoxicated, . . . she made the comment to him, you better not wreck and kill us."[3] In the accident reconstruction report, which was introduced into evidence without objection, Trooper Brenneis wrote that toxicology reports indicated that Pallottini's blood alcohol content (BAC) at the time of the crash was 0.14%, while Keaton's BAC was .01%. The toxicology report also indicated that Pallottini tested positive for marijuana at the time of the crash. On cross-examination, the trooper testified that no blood sample was taken from the defendant because the defendant "had already been transported" from the accident scene and that "nobody was able to get over to the hospital" to obtain the defendant's blood sample until too much time had elapsed after the accident.

Rebecca Sanders, the school bus driver involved in the accident, testified that shortly after dropping off the last group of children on her route, she saw the defendant's car come around a curve "at a very high rate of speed . . . the car was in my lane when I saw it right at first, and I just began braking the bus as fast as I could." She said that the bus came to a complete stop before the defendant's car hit it. Sanders said that the car "went into its lane" before the car went off the road into a grassy area. The car then went back onto the road and, in Sanders' words, "the right rear quarter [of the car] slammed into the front of the bus." Sanders said that after the collision she backed up her bus "because the car had kind of slid up under the bus a little bit . . . I just felt like I had to get it off of them." Rescue crews arrived on the scene a short time later.

After several of Keaton's and Pallottini's friends and family members testified regarding the pain and sadness the teenagers' deaths had caused, the defendant's grandmother, Freda Huffman, testified that before the accident the defendant "got mixed up with some of the wrong crowd[.]" Specifically, she acknowledged that the defendant had a criminal record and had served time on probation. However, she said that the defendant did not exhibit any of his past behavior after the accident. She said that the defendant suffered serious brain injuries during the accident; the defendant's injuries were so severe that his family initially "thought we were going to have to pull

---

[2]Little is known about the extent of Bevington's injuries. She neither testified at the sentencing hearing nor submitted a victim impact statement, and it is unclear whether Trooper Brenneis spoke to her as part of his investigation.

[3]The trooper's testimony regarding Bevington's statement to the EMT differs from his assessment of Bevington's statement contained in the accident reconstruction report. In the report, Trooper Brenneis wrote, "Huffman stated to Bevington that [h]e, Pallot[t]ini, and Keaton were drinking alcohol prior to the crash, and [Huffman] was observed by Bevington drinking." The report does not mention Bevington's telling the defendant "you better not wreck and kill us."

the plug." However, the defendant survived, although he had to relearn how to walk and talk. Howard Sutton, who said that he had employed the defendant's grandmother for thirty-five years and who said that he had known the defendant since he was born, also testified regarding the defendant's changed nature. Specifically, Sutton said that the defendant "has learned his lesson to the fullest extent . . . he could serve this community as well or better than anybody that could be given that task, and I believe that he would enjoy serving by helping other people."

The defendant, like his grandmother and Sutton before him, testified that he had a history of poor behavior and several criminal convictions but that he had changed his ways since the accident. He said that he was sorry for what he had done and that he now wanted to help others avoid making the same mistakes he had made. Regarding his physical problems, the defendant testified that he had poor balance and slurred speech and that he often wet the bed at night. He said that he had no recollection of the accident or the events leading thereto, but he acknowledged that it was "possible" that he had been drinking before the accident. He admitted that his license was suspended the day of the accident.

On cross-examination, the defendant acknowledged a lengthy history of traffic incidents since acquiring his driver's license in 1999. These included two traffic accidents within a three-week span in July 2000 and speeding tickets in September 2000, February 2001, and May 2001. The defendant acknowledged that his driver's license was first suspended in March 2001 and that to have his license reinstated he attended a defensive driving program in August 2001. However, the defendant was charged with driving under the influence (DUI) and two counts of aggravated assault for an incident that occurred the same month he completed the driving program. The defendant acknowledged that during the August 2001 incident, he drank vodka and pure grain alcohol and fired a gun into the air, and he also agreed that his blood alcohol content following his arrest was 0.16%. The defendant pled guilty to DUI and reckless endangerment and was placed on probation, which he violated. The defendant also acknowledged that in 2005 he was charged with aggravated assault. He ultimately pled guilty to misdemeanor assault and was again placed on probation, which he violated.

At the conclusion of the defendant's sentencing hearing, the trial court applied the following sentencing enhancement factors to Count 2 of the indictment, vehicular homicide involving victim Pallottini:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
> (4) A victim of the offense was particularly vulnerable because of age or physical or mental disability; and
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high[.]

Tenn. Code Ann. § 40-35-114(1), (4), (10) (2006). The trial court announced that it considered the defendant's proposed mitigating factors but found that none applied. Based on the three enhancement factors, the trial court sentenced the defendant to twelve years in the Department of

Correction, the maximum term for a defendant convicted of a Class B felony as a Range I, standard offender. See id. § 40-35-112(a)(2). The trial court, finding that the defendant was a dangerous offender pursuant to Tennessee Code Annotated section 40-35-115(b)(4), ordered that the defendant serve this sentence consecutively to the eight-year sentence he received for his vehicular homicide conviction involving victim Keaton. The trial court ordered that the other sentences be served concurrently, resulting in a total effective sentence of twenty years. The defendant subsequently filed a timely notice of appeal.

ANALYSIS

Applicability of Sentence Enhancement Factors

On appeal, the defendant argues that the record did not support the trial court's application of the "particular vulnerability" and "no hesitation to commit the offense when risk to human life was high" enhancement factors. See Tenn. Code Ann. § 40-35-114(4), (10). Accordingly, he urges this court to remand his case to the trial court for a new sentencing hearing. The State argues that the record supported the trial court's application of the two challenged enhancement factors.

Standard of Review

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994) (citation omitted); see Tenn. Code Ann. § 40-35-210(e).

Tennessee's sentencing act provides:

> (c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:
>
> > (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
> > (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c)(1)-(2).

The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the court's findings are adequately supported by the record. Id. § (d)-(f); State v. Carter, 254 S.W.3d 335, 342-43 (Tenn. 2008). "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in . . . the Sentencing Act." Carter, 254 S.W.3d at 346. Accordingly, on appeal we may only review whether the enhancement and mitigating factors were supported by the record and their application was not otherwise barred by statute. See id.

In imposing a sentence, the trial court may only consider enhancement factors that are "appropriate for the offense" and "not already . . . essential element[s] of the offense." Tenn. Code Ann. § 40-35-114. These limitations exclude enhancement factors "based on facts which are used to prove the offense" or "[f]acts which establish the elements of the offense charged." Jones, 883 S.W.2d at 601. Our supreme court has stated that "[t]he purpose of the limitations is to avoid enhancing the length of sentences based on factors the legislature took into consideration when establishing the range of punishment for the offense." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997); Jones, 883 S.W.2d at 601.

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, (7) the defendant's potential for rehabilitation or treatment, and (8) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee. Tenn. Code Ann. §§ 40-35-102, -103, -210; see also Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

Vulnerability Due to Age or a Physical or Mental Disability

The vulnerability enhancement factor enumerated in Tennessee Code Annotated section 40-35-114(4) is most often used in cases involving particularly old or young victims, but our supreme court has concluded that this enhancement factor "relates more to the natural physical and mental limitations of the victim than merely to the victim's age." Poole, 945 S.W.2d at 97 (quoting State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). The court in Poole noted that "[t]he factor can be used . . . if the circumstances show that the victim, because of his age or physical or mental condition was in fact 'particularly vulnerable,' i.e., incapable of resisting, summoning help, or testifying against the perpetrator." Id. (emphasis omitted) (quoting Adams, 864 S.W.2d at 35). The State bears the burden of proving that the victim's limitations rendered him particularly vulnerable, and the determination of whether the State has met its burden is a factual issue resolved by the trier of fact on a case-by-case basis. Id.

As the State notes in its brief, this court has repeatedly upheld application of the "particularly vulnerable" enhancement factor based upon the victim's significant degree of intoxication. See State v. Gray, 960 S.W.2d 598, 611 (Tenn. Crim. App. 1997); State v. Robinson, 971 S.W.2d 30, 46 (Tenn. Crim. App. 1997); State v. Buckmeier, 902 S.W.2d 418, 424 (Tenn. Crim. App. 1995). In several cases where this court upheld the trial court's applying this enhancement factor based upon the victim's intoxication, the record reflected that the defendant was aware that the victim was so intoxicated that he or she was unable to resist the defendant's behavior. See Robinson, 971 S.W.2d at 46 (victim beaten to death by several defendants was seen "staggering inside and outside the establishment" before his death); Buckmeier, 902 S.W.2d at 424 ("defendant [in rape case] knew the victim had been drinking and was 'passed out' when he decided to have sex with her"); State v. Billy Gene Earnest, No. 01C01-9412-CR-00434, 1996 WL 63878, at *13 (Tenn. Crim. App., Nashville, Feb. 13, 1996) ("overwhelming testimony [existed] that the [murder] victim was the most intoxicated of any of those present and was having difficulty standing up at the time the defendant beat and kicked him. . . . [T]he victim was essentially unable to defend himself due to his extreme state of intoxication."). We have also upheld application of this enhancement factor when expert medical testimony established the degree to which a victim's intoxication would make the victim particularly vulnerable. See Gray, 960 S.W.2d at 611 (pathologist testified that murder victim, whose BAC at her death was 0.24% and who was also under the influence of marijuana and a sedative, would have suffered from loss of coordination and could have bruised easily); State v. William Ray Rhodes, No. 02C01-09406-CC-00124, 1995 WL 425046, at *6 (Tenn. Crim. App., Jackson, July 19, 1995) (pathologist testified that murder victim, who died of hypothermia after being beaten and left outside in cold weather, was "especially vulnerable to hypothermia" due to intoxication; victim's BAC was 0.20% at her death).

The facts of this case can be distinguished from the ones cited above. Pallottini's autopsy indicated that his BAC at his death was 0.14%; however, no evidence was presented regarding how Pallottini's intoxication would have inhibited his ability to comprehend his surroundings or "resist" the defendant by telling him to slow down. Furthermore, no evidence was presented that the defendant was aware that the victim was significantly intoxicated. Accordingly, we conclude that the admissible evidence produced at the sentencing hearing did not support the trial court's

application of the "particularly vulnerable" enhancement factor.

No Hesitation to Commit Offense When Risk to Human Life Was High

In a case where the defendant was convicted of reckless vehicular homicide, this court concluded that application of the "risk to human life" enhancement factor was appropriate "where the defendant creates a high risk to the life of a person other than the victim, because the facts establishing the enhancement factor would be separate from the facts necessary to establish a high risk of death to a person." State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995) (emphasis removed), rev'd in part on other grounds by Hooper, 29 S.W.3d at 9-10; see also State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987) (defendant, who struck two pedestrians, convicted of vehicular homicide based upon driver intoxication; application of enhancement factor appropriate based upon presence of other pedestrians and defendant's nearly hitting a police officer directing traffic). "Conversely, if there is no risk to the life of a person other than the victim, clearly the proof necessary to establish enhancement factor (10) will be encompassed by the proof necessary to establish an essential element of vehicular homicide," and application of the factor would be inappropriate. Id. at 453.

In applying the "risk to human life" enhancement factor, the trial court noted, "Every person you passed on the road was a potential victim. We have testimony from people . . . behind you [who] thought they were going to get hit." The defendant argues that the trial court's application of this enhancement factor was inappropriate in that "there was no evidence that the [defendant] passed anyone on the road," the trial court's comments to the contrary. We agree with the defendant in part, as neither Trooper Brenneis nor Sanders, the school bus driver, testified regarding the presence of other drivers on the road. However, the defendant's actions in driving between 75 and 79 miles per hour on a two-lane road did create a high risk of death to Sanders, who testified at the sentencing hearing. Accordingly, we conclude that the trial court did not err in applying enhancement factor (10) to the defendant's sentence.

Length of Sentence

While we have concluded that the trial court erred in applying the "particularly vulnerable" enhancement factor to the defendant's sentence, that conclusion does not necessary require this court to reduce the defendant's sentence or remand the case to the trial court for a new sentencing hearing. "The mere number of existing enhancement factors is not relevant—the important consideration [is] the weight to be given each factor in light of its relevance to the defendant's personal circumstances and background and the circumstances surrounding his criminal conduct." State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995) (citing Moss, 727 S.W.2d at 238). In this case, the trial court placed "great weight" on both the "risk to human life" enhancement factor, which we have concluded the trial court properly applied, and the "previous criminal history" enhancement factor, application of which the defendant does not challenge on appeal. The presentence report indicates, and the defendant acknowledged at the sentencing hearing, that the defendant has prior convictions for public intoxication, assault, driving under the influence, and reckless endangerment. Thus, the trial court's application of this enhancement factor was supported by the record. Given the existence

of two enhancement factors, each of which carries significant weight, and the lack of mitigating factors, we affirm the trial court's imposition of the maximum twelve-year term for the defendant's vehicular homicide conviction involving victim Pallottini.

Consecutive Sentences and Admissibility of Challenged Evidence

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4) (2006). When imposing consecutive sentences based on the defendant's status as a dangerous offender, the trial court must, "in addition to the application of general principles of sentencing," find "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In all cases where consecutive sentences are imposed, the trial court is required to "specifically recite [on the record] the reasons" behind imposition of consecutive sentences. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In addition to arguing that the facts of the instant case do not support the imposition of consecutive sentences, the defendant also argues that the trial court erred by basing its consecutive sentencing determination on evidence that was improperly admitted. We will address these issues in turn before addressing the propriety of the trial court's imposition of consecutive sentences.

Admissibility of Hearsay Statements Within Trooper's Testimony and Report

The defendant first argues that the trial court erred in admitting certain hearsay statements at his sentencing hearing. Specifically, the defendant challenges the admissibility of the testimony offered by Trooper Brenneis that upon entering the vehicle, Bevington realized everyone in the car had been drinking and told the defendant that he "better not wreck and kill us." Trooper Brenneis did not hear this comment directly from Bevington but instead heard it from the EMT who treated her immediately following the accident. The defendant objected to the trooper's testimony at his sentencing hearing; the trial court overruled the objection, finding that the testimony was reliable hearsay.[4] The defendant argues that this statement is inadmissible hearsay that "goes to the intoxication of the appellant, and the possible reckless nature of his conduct." The State contends that the truth of the matter asserted in the statement, namely the defendant's intoxication, was proven by the defendant's plea of no contest to vehicular homicide caused by intoxication. Furthermore, the State argues that the defendant failed to affirmatively attack the reliability of the hearsay evidence.

[4]The trooper's accident reconstruction report, which references Bevington's observation that the car's occupants were drinking but which does not reference her supposed warning to the defendant, was introduced without objection as an exhibit at the sentencing hearing. The findings of the report were also incorporated into the presentence report, which was also introduced without objection as an exhibit.

It is well-settled in Tennessee that a trial court has statutory authority to admit trustworthy and probative evidence, including reliable hearsay, for sentencing purposes as long as the defendant is "accorded a fair opportunity to rebut any hearsay evidence so admitted." Tenn. Code Ann. § 40-35-209(b). See State v. Carney, 752 S.W.2d 513 (Tenn. Crim. App. 1988); State v. Flynn, 675 S.W.2d 494 (Tenn. Crim. App. 1984); State v. Chambless, 682 S.W.2d 227 (Tenn. Crim. App. 1984). Furthermore, "an indicia of reliability must be present to satisfy the due process requirement." State v. Taylor, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987).

We are not persuaded that the statement by Trooper Brenneis in this case was untrustworthy or unreliable. Trooper Brenneis relied on the statements and information provided by EMT Johnson and many others in conducting his thorough investigation of the accident scene. Trooper Brenneis documented in his presentence report that "[the defendant] was observed by Bevington drinking." Bevington's comment that everyone in the car had been drinking was corroborated by the blood alcohol content of the two decedents in this case and further established through the defendant's plea of no contest. See Teague v. State, 772 S.W.2d 932, 943 (Tenn. Crim. App. 1988) ("A plea of nolo contendere admits every essential element of the offense, . . . and it is tantamount to an admission of guilt for purposes of the case in which the plea is entered."). We find that the trial court did not err in admitting this statement as reliable hearsay.

Moreover, we do not believe that the defendant was deprived of a fair opportunity to rebut such statements. The record is clear that the defendant cross-examined Trooper Brenneis regarding the officer's investigative methods and the circumstances surrounding his conversation with EMT Johnson. The defendant also testified regarding his conduct and acknowledged that while he has no memory of the accident, "it's possible" that he had been drinking on the day of the accident. Furthermore, the defendant was free to request a continuance in order to subpoena EMT Johnson and Bevington, but he declined that opportunity.

Even assuming arguendo that the statement was improperly considered at sentencing, the error was in fact harmless. Before addressing the enhancement factors applicable to the defendant's vehicular homicide conviction involving victim Pallottini, the trial court recognized that Bevington's statement "comes from a report." Between this qualifying statement and the fact that the trial court did not reference Bevington's statement again during its ruling from the bench, we can reasonably conclude that the trial court did not rely on the statement significantly in determining the appropriate length and manner of the defendant's sentences. As stated above, there was abundant evidence apart from Bevington's statement that justified the trial court's twelve-year sentence for vehicular homicide, and as will be examined below, the trial court sufficiently cited evidence other than Bevington's statement in imposing consecutive sentences. For these reasons, we conclude that the defendant's assertion that the trial court erred by admitting the hearsay testimony of Trooper Brenneis is without merit.

Admissibility of Case File from Defendant's Guilty Plea in Prior Unrelated Case

After the defendant testified, the trial court announced its intent to take judicial notice of the file in Sumner County Criminal Court case number 422-2002, in which the defendant pled guilty to

one count of DUI and two counts of reckless endangerment. The trial court said that the State "brought this out on cross-examination some, and this goes into the efforts of rehabilitation and other things that I must consider under our sentencing laws." The exhibit was admitted without objection; defense counsel noted, "[T]hat was testified to and was in the presentence report." While the defendant did not object to admitting the case file at the sentencing hearing, on appeal he argues that the trial court improperly "went further than looking at the disposition in the earlier case, and actually accepted the report as substantive evidence in the case." The defendant argues the trial court then used the evidence to justify the imposition of consecutive sentences. He asserts that the trial court's actions exceed "the scope allowed for judicial notice, and deprived the [defendant] of any right to cross[-]examine any of that evidence." We disagree.

The Tennessee Rules of Evidence allow the trial court to take notice of "adjudicative facts" that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Tenn. R. Evid. 201(a), (b). "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice is taken." Tenn. R. Evid. 201(e).

In this case, after the trial court sentenced the defendant on the vehicular homicide count involving victim Pallottini, it addressed whether consecutive sentences would be appropriate. After briefly discussing the Wilkerson case as it related to the "dangerous offender" consecutive sentencing factor, the trial court made the following comments:

> And let me just read to you from the exhibit from the former case. Maybe it gives us some idea of what happened out there. This happened, a former DUI of the defendant. It occurred the 26th of August, 2001, and this is what the report states: Subject—that means you, Mr. Huffman—was observed south on Louisville Highway at approximately 80 miles an hour in a 45-mile-an-hour zone. Subject lost control of the vehicle in a curve at the bottom of the ridge, regained control, then spun around on the side of the road just south of Goodlettsville Auto Salvage. Subject then cut out his lights and pulled into a drive at the GAS striking the fence on the north side of the gate. Upon making contact with the driver, he identified himself as . . . the arrestee and stated that he [had] just been in a fight.
>
> That's you. So I find that might give us a little insight to what's going on, that you're a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high, and all three of these factors apply.

The defendant argues that the trial court's referencing an arrest report contained in the file for Sumner County case number 422-2022 exceeded the proper scope of judicial notice. However, the defendant failed to object to either the trial court's announcing its intention to take judicial notice of the court file or its referencing the arrest report during its announcement of its sentencing

decision. The defendant also did not object when the State cross-examined the defendant about the facts surrounding the prior case, facts which were not listed in the presentence report in the instant case. Specifically, the defendant acknowledged firing a gun in the air and drinking pure grain alcohol, and that his BAC following his arrest was 0.16%. Furthermore, as will be seen below, the trial court justified its imposition of consecutive sentences based upon the facts of this case and the information contained in the presentence report rather than the facts of the former case. We therefore conclude that the defendant's assertion regarding the trial court's taking judicial notice of the former case file is without merit.

Imposition of Consecutive Sentences

In imposing consecutive sentences, the trial court found that both of the required Wilkerson factors—the sentence imposed reasonably relates to the severity of the defendant's offenses and confinement is necessary to protect society from the defendant's further criminal conduct—applied in this case. The trial court noted:

> [T]he circumstances surrounding the commission of the offense [were] aggravated. It can't get more aggravated than this. You violate the law by driving on a revoked license. . . . [Y]ou end up at 74 to 79 miles an hour on a 40-mile-an-hour road. You've got a 17-year-old with you, two 18-year-olds with you. You're 22. There's alcohol, extreme recklessness. There's two deaths. . . .

In our view, these findings justified the trial court's finding that the defendant's aggregate sentence reasonably relates to the severity of his offenses. Regarding the necessity of confinement, the trial court noted that despite the defendant's being given several alternative sentences and attempts at rehabilitation and treatment, he continued his criminal behavior. The court found that "confinement for an extended period of time is necessary to protect society from the defendant's unwillingness to lead a productive life, and the defendant's resort to criminal activity and furtherance of an antisocietal lifestyle." In our view, the record fully supports this finding. Accordingly, we conclude that the trial court properly imposed consecutive sentences based upon the "dangerous offender" factor provided in Tennessee Code Annotated section 40-35-115(b)(4).

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

_____

D. KELLY THOMAS, JR., JUDGE